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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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No. ~~111~~ 19

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA,
*Petitioner,*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

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No. ~~692~~ 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
*Petitioner,*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

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**Brief On Behalf Of**
**The National Association Of Supervisors Of State Banks**
**As Amicus Curiae**

---

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## Brief On Behalf Of The National Association Of Supervisors Of State Banks As Amicus Curiae

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This brief, filed with the written consent of all Petitioners, is submitted on behalf of the 50 officials of state governments responsible for the supervision of state-chartered banking institutions in every state of the United States, and their counterparts in Puerto Rico and the

Virgin Islands. Together they form the membership of the National Association of Supervisors of State Banks.[1]

As of December 31, 1968, there were 9,483 commercial and savings banks chartered under state laws, with total resources of approximately 278 billion dollars, subject to the Supervisors' jurisdiction.

## QUESTION PRESENTED

Whether, for the purposes of the reference in 12 U.S.C. § 36 to state law as determining whether a national bank may establish a "branch," the determination of what banking activities amount to a "branch" is governed exclusively by federal law based upon the definition of a "branch" in that section, or also includes other banking activities held to be an unlawful "branch" under state law.

## STATUTES INVOLVED, STATEMENT OF THE CASE

The statutes involved and statement of the case are as set forth in the Respondents' brief on the merits.

## INTRODUCTION

The Supervisors have a critical interest in this case. Its disposition will decide the extent of competitive equality between national and state banks in the matter of branching, upon which the vitality of the dual banking system rests.

Section 36(c) establishes state law as the standard for branching of national banks. In this way Congress left to the individual states the resolution of the extent to which branching should be permitted in order to reflect

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[1] The Supervisors formed the sole membership of the Association from its founding in 1902 until 1958. At that time state banks were invited to join as "associate" members. There are currently 4,642 such associate members, representatives of whom advise and assist the Board of Directors. The Board consists entirely of Supervisor members and has sole authority to supervise the Association's affairs and determine its policies.

different local conditions and branching policies. Had Congress elected to permit the establishment of branches of national banks without regard to state law, there would shortly have been a single standard based on federal law for branching for all banks, state as well as national. This is so because state legislatures would have been forced to conform their branch laws to national policy, inasmuch as no state bank could survive in competition with a national bank having authority to establish branches not permitted to state banks.

There are arguments on both sides of the branching question—an issue which has been debated ever since branching emerged as a significant factor during the first two decades of this century.[2] Briefly, proponents of branching allege a greater efficiency for banks permitted to branch than for non-branching or "unit" banks. They claim that branching leads to larger banks able to provide larger loans needed by commerce and industry, and a more extensive range of services to the public than can often be provided by smaller unit banks. Opponents of branching, however, fear economic concentration as a result of branching and assert that the public interest is best served by the unit banking system.[3]

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[2] There were 87 banks operating branches in the country by the turn of the century, and 292 by 1910. This number almost doubled, to 530, by 1920. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 428 (1941). Between 1900 and 1920 the percentage of loans and investments of all banks controlled by branch institutions grew from 2% to 15%. FISCHER, AMERICAN BANKING STRUCTURE 30 (1968)

[3] For arguments in favor of branch banking see the address of Comptroller Saxon entitled "The Role of Branch Banking" inserted in the record of *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State laws*, 88th Cong., 1st Sess., 371-375 (1963). For arguments opposing branch banking see testimony of witnesses from the Independent Bankers Association, *Id.* at 16-25. See, also, FISCHER, *supra* note 2, at 8; KOHN, BRANCH BANKING, BANK MERGERS AND THE PUBLIC INTEREST (1964); Shull and Howitz, *Branch Banking and the Structure of Competition*, 1 NAT'L BANKING REV. 301

Legislatures of the 50 states have acted differently on the issue of branching and have enacted laws reflecting their own resolution of the branch versus unit banking question. Twelve states permit unlimited branching throughout the state.[4] Fifteen states prohibit branching altogether, although several of these permit off-premise offices with limited powers (e.g., paying and receiving stations, generally called "tellers' windows").[5] The remaining 23 states adopt a middle ground with widely varying restrictions.[6] Thus, they may offer some of the benefits

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(1964); INDEPENDENT BANKERS ASS'N, INDEPENDENT BANKING: AN AMERICAN IDEAL (1965); *Branch Banking: The Debate Continues*, BANKING, July 1961, at 14. Kaufman, *Bank Market Structure and Performance*, 32 SOUTHERN ECON. J. 429 (1966); and Benston, *Branch Banking and Economics of Scale*, 20 J. OF FINANCE 312 (1965).

[4] ALASKA STAT. § 06.05.415 (1962); ARIZONA REV. STAT. § 6-223 (1956); CAL. FINANCIAL CODE § 500 (1964); DEL. CODE ANN., tit. 5, § 770 (Supp. 1969); HAWAII REV. STAT. § 403-53 (1968); IDAHO CODE § 26-1001 (1968); MD. CODE ANN. art. 11, § 65 (1968); NEV. REV. STAT. § 660.010 (1967); N. C. GEN. STAT. § 53-62 (Supp. 1967); R. I. GEN. LAWS § 19-1-13 (1968); S. C. CODE § 8-57 (1962); and VT. STAT. ANN. tit. 8, §§ 501 to 505 (1958), as amended, § 502a (Supp. 1968).

[5] ARK. STAT. §§ 67-205, 67-340 to 67-352 (1966); COLO. REV. STAT. § 14-3-1 (1963); FLA. STAT. § 659.06 (1966)*; ILL. REV. STAT. ch. 16-1/2, §§ 105, 106 (Supp. 1969)*; IOWA CODE § 528.51 (1969); KAN. STAT. ANN. § 9-111 (Supp. 1969)*; MINN. STAT. ANN. § 48-34 (1946); MO. STAT. ANN. §§ 362.105, 362.107 (1968); MONT. REV. CODE § 5-1028 (1968)*; NEB. REV. STAT. § 8-157 (Supp. 1967)*; N. D. CODE §§ 6-03-15 to 6-03-19 (1959), § 6-03-14 (Supp. 1969); OKLA. STAT. tit. 6, §§ 501, 1061 (1966); TEX. CIV. STAT. ANN. art. 342-903 (Supp. 1969); W. VA. CODE ANN. § 3131 (1961); Wyo. (no statute relating to branching, which fact has been construed as prohibiting branching). (Asterisks indicate outside tellers' windows permitted.)

[6] ALA. CODE tit. 5, §§ 125, 125(1) (1960); CONN. GEN. STAT. ANN. § 36-59 (1969); GA. CODE ANN. § 13-203.1 (Supp. 1968); IND. STAT. ANN. § 18-1707 (1964); SUPP. KY. REV. STAT. § 287.180 (Supp. 1968); LA. REV. STAT. ANN. §§ 6:54 to 6:56, 6:244 (1951); ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1969); MASS. GEN. LAWS ch. 172, § 11 (Supp. 1968); MICH. STAT. ANN. § 23.762 (1957); MISS. STAT. ANN. §§ 5226 to 5236 (1956), as amended § 5228 (Supp. 1966); N. H. REV. STAT. ANN. § 384-B:2 (1968); N. J. STAT. ANN. § 17:9A-19 (Supp. 1969); N. M. STAT. ANN. §§ 48-2-16 to 48-

of branching, while at the same time protecting small unit banks throughout a state from branching by large city banks, through a restriction of branching to the city and/or county of the head office of a bank, and/or its contiguous counties, or to a specified mileage radius of the head office. Additionally, or alternatively, they may adopt a standard of a minimum population of a geographical area in which a branch may be established, or permit branching only in an area in which no unit bank is located.

There is today, therefore, "competitive equality" in the matter of branching based upon state law. Both classes of banks—state and national—are bound by the same rules which are tailored, state by state, to meet differing economies as well as divergent philosophies on the issue of branch versus unit banking.[7] There is also considerable flexibility and protection in the system. Either or both classes may apply to the state legislature at any time to seek expansion or modification of existing branch statutes. Indeed, in just the past six years one third of the states have amended their statutes to reflect changing economic conditions or attitudes.[8]

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2-19 (1966); N. Y. BANKING LAW § 105 (Supp. 1969); OHIO REV. CODE ANN. 1111.02 to 1111.06 (1968); ORE. REV. STAT. § 714.050 to 714.990 (1963); PA. STAT. ANN. tit. 7, § 904 (1967); S. D. COMP. LAWS 51-8-1 to 51-8-7 (1967); TENN. CODE ANN. § 45-211 (1964); UTAH CODE ANN. § 7-3-6 (Supp. 1967); VA. CODE §§ 6. 1-26 to 6. 1-29.1 (1966); WASH. REV. CODE § 30.40.020 (1961); WIS. STAT. ANN. § 221.04 (Supp. 1968).

[7] In general, statewide branching is to be found primarily in the west; prohibited branching between the Mississippi and the Rockies; and limited branching (with a number of exceptions, such as Florida), in the eastern third of the United States. *Supra* notes 4-6, FISCHER, *supra* note 17, at 66-67.

[8] In the past six years *Wisconsin* (1967) and *New Hampshire* (1963) moved from the non-branching to the limited branching category. States with limited branching liberalized their restrictions in a numbers of respects: *Alabama* extended the areas in which branches can be established each year between 1963 and 1967; *Georgia* and *Hawaii* extended the number of branches that can be estab-

Between the time of the formulation of Section 36(c) in the McFadden Act of 1927 and the Banking Act of 1933, and the administration of Comptroller Saxon beginning in 1961, little difficulty was experienced with the foregoing meshing process in our federalism.[9] Comptroller Saxon, however, radically changed the direction of the Comptroller's office. A vigorous advocate of a uniform standard for branching set by Congress which would

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lished at certain locations in 1967; *Indiana* decreased population minimums for cities in which branches can be located in 1963; *Kentucky* eliminated a restriction on branching in adjacent counties only if there is no existing bank in 1966; *New York* amended its intra-district branching pattern to eliminate the restriction on branching to a city or village in 1968, and eliminated population minimums in 1964. Most of the non-branching states permitted or increased the authority to provide service through off-premise "tellers' windows" or adjacent facilities: *Arkansas* (1965); *Florida* (1965); *Illinois* (1965); *Oklahoma* (1965); *Kansas* (1967); *Montana* (1963); *Nebraska* (1963); *North Dakota* (1963) and *Texas* (1963). For statutory citations see *supra* notes 5 and 6.

[9] There was a virtual void in litigation wherein a state bank challenged a branch decision of the Comptroller and, indeed, none whatever prior to 1958. See annotations following 12 U.S.C.A. 36(c). Further, there was an affirmative cooperative working relationship between the Supervisors and the Comptroller's office relating to an interchange of information on branch filings, and a program for processing competitive applications of national and state banks for a branch at a location where under state law only one branch could be located, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied* 358 U.S. 830 (1958), and *Bank of Sussex* v. *Saxon*, 251 F.Supp. 132, 138-9 (D.N.J. 1966), which the cited cases held to be within the scope of Congressional intent in the administration of Section 36 of the National Bank Act. For examples of the principle of competitive equality in national bank authorizations before Mr. Saxon, which were changed by him, see *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Banking Laws*, 88th Cong., 1st Sess. 104, 105, 124, 132-134 and 198 (1963). For expressions of the acceptance of the principal of competitive equality by prior Comptrollers, see *Hearings Before the Senate Committee on Banking and Currency on the Study of Banking Laws*, 84th Cong., 2d Sess. 27 (1956); *Hearings Before the House Committee on Banking and Currency on the Financial Institutions Act of 1957*, 85th Cong., 1st Sess. 160 (1957).

permit national banks to branch statewide,[10] and restless with branching restrictions in state law applicable to national banks,[11] he began a vigorous program to test the perimeters of his authority to authorize branches of national banks. This action resulted in a veritable deluge of litigation,[12] and, in particular, his claim that he was only bound by certain portions of state branch law engendered this Court's decision in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), that the Comptroller could not "pick and choose what portion of the law binds him." (*Id.* at 261) However, the controversy is by no means at an end. The Comptroller's office continues to test the perimeters of the *Walker Bank* case,[13] as well as to explore other avenues to avoid restrictions in state branch law.[14]

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[10] *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Banking Laws*, 88th Cong., 1st Sess., 371-375 (1963) (address by Comptroller Saxon inserted in the record).

[11] "The branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual states find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers and the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963).

[12] See annotations following 12 U.S.C.A. 36(c).

[13] "The task of the Court in resolving the conflicting contentions of the parties is made unnecessarily difficult by reason of the failure of the Comptroller to accept his clearly defined responsibility in processing applications to establish branch national banks. For some unsatisfactorily explained reason, he insists . . . that he is only bound by 'capital' and 'location' restrictions of State law in considering applications of national banks to establish branches. This argument is made in the face of the recent decision of the Supreme Court in [the *Walker Bank* case]." *First Citizens Bank & Trust Co.* v. *Camp*, 281 F.Supp. 786, 789 (E.D.N.C. 1968), *aff'd.* Civ. No. 12552 (4th Cir., May 13, 1969).

[14] The courts have struck down as "clever devices of evasion" efforts of the Comptroller to permit a national bank to move its main office to the location of a branch site forbidden under state law, while retaining its old banking house as a "branch." *American Bank & Trust Co.* v. *Saxon*, 373 F.2d 283, 291 (6th Cir. 1967);

In particular, and coming to the central issue in this case, the position taken by the Comptroller that he is completely immunized from state branch statutes under Section 36(f) of the Act has resulted in national banks being permitted off-premise activities prohibited to state banks under some state branch statutes. This has occurred in three ways.

First, the development of parking congestion in downtown areas after World War II resulted in the development of "drive-in" and similar facilities adjacent to, or near, an existing banking office. The question arose as to whether these facilities were simply extensions of an existing banking office or a "branch" either prohibited by, or requiring approval under, state branch law. Rulings were made by various state attorneys general of the states construing state branch statutes on this point and, initially, any problem of competitive inequality between state and national banks was avoided by the Comptroller's office permitting national banks operating in those states to establish offices "similar to those permitted state-chartered banks under the respective opinions of the Attorneys General," with but two exceptions. 93 COMPT. CURR. ANN. REP. 13 (1955). More recently, however,

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*Bank of Dearborn* v. *Saxon*, 377 F.2d 496, 498 (6th Cir. 1967). Further, on the grounds that savings and loan associations conduct the "banking" business within the meaning of the definition of "state bank" in Section 36(h) of the National Bank Act, and that Section 36(h) is completely immunized from state law, the Comptroller has held that a national bank may branch in a state which prohibits state banks from establishing branches but which permits savings and loan associations to branch. *American State Bank* v. *Camp*, Civil No. 182-66 (D.D.C.) (case subsequently dismissed June 24, 1968, by withdrawal of application by the national bank). On this latter point see *Nuesse* v. *Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967), where, in permitting the Wisconsin State Bank Supervisor to appear in the *American State Bank* case, the court said: "Even though Section 36(h) of the National Bank Act is not an adoption of state law like Section 36(c), it is part of a federal statute that reflects a pervasive policy of coordination. It would be unsound to assert that the proper interpretation of Section 36(h) is independent of state policy and legislation."

this policy has been abandoned, and the Comptroller has ruled that his determination of whether such a facility desired by a national bank is or is not a "branch" can be made without regard to state branch law even if it resulted in instances where a national bank was permitted a facility barred to a state bank under state law as an unlawful branch. *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F.Supp. 180 (D. Wash. 1966), upon which the court below so heavily relied (A. 401-406), held that ruling of the Comptroller to be in error.[15]

Second, as seen from note 5, *supra*, a number of states prohibiting branches nevertheless permit "tellers' windows", or offices with the limited power of receiving deposits and cashing checks. Prior to Comptroller Saxon's administration, national bank branches in such states were authorized to operate only with those limited powers accorded state banks under state law.[16] Mr. Saxon, however, took the position that if a state bank authorizes any of the named banking functions in Section 36(f), such as cashing checks or receiving deposits, he had the authority to approve national bank branches with the

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[15] In *Mid-West Nat'l Bank of Lake Forest* v. *Comptroller*, 296 F.Supp. 1223, 1226 (D. Ill. 1968) the court pointed out that the Comptroller defended his approval of an adjacent facility for a national bank in Illinois on the grounds that it was *in compliance with Illinois law*, citing *Walker Bank*. This *may* be an indication that the Comptroller's office has reversed the position of Mr. Saxon relating to Section 36(f) and has accepted the position of *State Chartered Banks, supra*. But see: *Jackson* v. *First Nat'l Bank of Valdosta*, 246 F.Supp. 134 (M.D. Ga. 1965), a pre-*Walker Bank* case.

[16] *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Bankings Laws*, 88th Cong., 1st Sess., 124 (1963). The validity of this position seems particularly strong in the light of the fact that the sole reason why Section 36(f) was included in the McFadden Act of 1927 was to assure that "tellers' windows" would be "branches" subject to state law under Section 36(c) of the Act. (pp. 29-31, *infra*)

power to conduct *any* banking transactions performed by the head office of the bank.[17]

Third, and coming to the factual situation involved in this case, the Comptroller issued Ruling 7490 in 1964 permitting a national bank to provide messenger service by means of an armored car under an agency agreement.[18] Similarly, in 1966 he permitted off-premise loan production offices and off-premise deposit machines.[19] The validity of these rulings is geared to the contention now before this Court, that Section 36(f) is immunized from state law and, therefore, the Comptroller may authorize off-premise banking activities which he contends do not meet the provisions of Section 36(f), regardless of whether under state branch statutes a state bank would be prohibited from performing a similar service.

In the light of the foregoing, it is evident why the Supervisors have a keen interest in this case. The essential question herein is the ultimate choice of law for determining the question of when an additional banking office is a "branch" subject to the restrictions of Section 36(c). If the answer to that question is exclusively a matter of federal law, to be decided without regard to state branch statutes by which state banks are bound, the Supervisors fear a serious imbalance in the dual banking system, or in the competitive equality underlying Section 36(c) of the National Bank Act, based upon *state* law. Both alternatives are real. If national banks are permitted off-premise banking activities not permitted state banks, on the grounds that such activities do not constitute branching subject to the provisions of Section 36(c) of the Act, state banks will be placed at such a competitive disadvantage that they will be forced to convert to national banks and the dual banking system will be weak-

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[17] *Id.* at 348-351, 347, 342-343.

[18] COMPTROLLER'S MANUAL FOR NAT'L BANKS, ¶ 7490, (A. 381).

[19] *Id.* at ¶ 7380, 7491.

ened. Alternatively, state legislature will be forced to act quickly to amend their statutes to permit each type of off-premise activity declared lawful for national banks by the Comptroller. State branching policy based upon local conditions, which underlay Congressional intent to establish state law as the standard for branching under Section 36(c) of the National Bank Act, would be completely subverted.

It is the position of the Supervisors that Section 36(f) of the National Bank Act does not purport to be an *all-inclusive* definition of a "branch". Section 36(f) merely *includes* types of off-premise activities of a bank which may be considered a branch. Indeed, as noted at pp. 29-31, *infra*, the legislative history of Section 36(f) demonstrates that it was included in the McFadden Act of 1927 for the purpose of assuring that at least so-called "tellers' windows", then a current effort of the Comptroller to evade restrictions of national bank branching, would be considered an off-premise activity to be permitted only to the extent permitted state banks by state law. The determination of whether *other* types of off-premise activities may amount to a "branch" not permitted state banks under state law, and, therefore, not permitted national banks, is governed by state branching policy as reflected in state statutes relating to branching. In this way, and in this way only, can Congressional intent to achieve competitive equality between national and state banks in the matter of branching, based on state law, be maintained.

The position taken by the Supervisors places state branch statutes in a position of dominance in the matter of branching, and creates a diversity of permissible off-premise banking activities for both state and national banks throughout the country, dependent upon varying branching policies reflected in the statute law of the individual states. This brief will demonstrate that this is *precisely* what Congress intended. At the outset, how-

ever, the Supervisors would like to put to rest forthwith the concern underlying the entire brief of the *amici* banks, and a large portion of the Comptroller's brief (pp. 31-41), to the effect that the construction of Section 36 of the Act for which the Supervisors contend somehow places national banks in the position of being subject to "unfriendly" rulings of Supervisors or state Attorneys General, or "unfriendly" statutory enactment of state legislatures, resulting in national banks being barred from conducting a wide variety of useful activities, and further creating an unacceptable variation of permissible off-premise activities for national banks in different states.

The source of state law governing the determination of when an off-premise banking activity is a branch is not Supervisor discretion, but the *statute* of a state reflecting its branching policy. As each instance of off-premise banking activity develops, the question arises as to whether it is in accord with, or contrary to, that *statute.* Since state statutes do not cover all eventualities, it is necessary to construe the statute as applied to particular factual situations. In the absence of applicable judicial decisions, Supervisors, usually pursuant to rulings of the state attorneys general, have been called upon to construe state statutes relating to branching.

Virtually the only types of rulings restricting off-premise activities cited by the Comptroller and the *amici* banks relate to deposit and check cashing activities (armored car messenger services, shopping center receptacles for deposits, deposit machines) and loan activities (through loan production offices)—all relating to the banking business "unless", to use the words of the court below, "we were to cast away all concepts of the functional 'business' of a bank." (A. 409) Each ruling has reflected the construction of the state branch statute to determine whether the challenged off-premise activity is, or is not, within the scope of state branching policy as

reflected in the statute. Each ruling is non-discriminatory—equally applicable to *both* state and national banks. Each ruling is subject to judicial review for its correctness. Indeed, the ruling of the Supervisor in this case (Comptroller of Florida) is presently under judicial review, and the court below directed that the ultimate disposition of this case await that judicial determination. (A. 408-409)[20]

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[20] The absence of judicial constructions of state branching statutes relating to these off-premise activities is to be expected because of their relatively recent development. Thus, as the Chairman of the Federal Reserve Board recently testified, ". . . the establishment of loan production offices by banks is a relatively new development . . . ." *Hearings before the House Committee on Banking and Currency on Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 32 (1968). So are teller machines, as indicated by the recent date of the rulings cited by the Comptroller. (Brief, n. 38, p. 39) Nor is the armored car service of the type here in question yet a widespread activity. The Comptroller only cited 13 states where it has had any use whatever (A. 184) including Florida, where it was found unlawful by the case below, and Georgia, where it was found unlawful in *Jackson* v. *First Nat'l Bank of Cornelia*, 292 F.Supp. 156 (N.D. Ga. 1968) Few states have statutory provisions specifically covering the subject: the OHIO REV. CODE ANN. 1101.01(D)(3) specifically excludes from the definition of a "branch" locations where items are received "by armored car service", and in 1968 Virginia permitted banks to utilize armored vehicles for the receipt of customers' deposits in areas where the bank could establish a *de novo branch* (VA. STAT. Chap. 727.) There are also rulings of State Attorneys General or Supervisors covering this type of service, most of which are of relatively recent origin. In addition to the rulings in Florida and Georgia prohibiting this type of service, *supra*, similar rulings have been made in Kentucky (Letter from Deputy Commissioner to First Nat'l Bank of Louisville, October 15, 1968); Montana (Ruling of Supervisor based on Opinion of Attorney General, November 22, 1961); South Carolina (Ruling of Board of Bank Control, August 11, 1965); and Connecticut (Letter from Deputy Attorney General to Bank Commissioner, February 23, 1951). On the other hand, this service has been permitted substantially along the lines of that permitted by the Comptroller in California (State Banking Department's Weekly Bulletin, April 9, 1965); Colorado (Banking Board Regulation 3-1.1); and Pennsylvania (Notice from Secretary of Banking, to all State Banks, September 23, 1964).

Petitioners have hypothecated that under the decision below, state legislatures would be able to pass legislation unfriendly to national banks, or Supervisors would be able to issue unfriendly rulings, barring a wide range of additional activities, on the grounds that they constitute unlawful branching. Just why state legislatures or Supervisors would embark on a program to prohibit *state* banks from conducting useful activities in order to be unfriendly to *national* banks is never explained, and is an argument patently without merit. Further, state branch statutes are not open-ended; unreasonable constructions of those statutes can be struck down in the same manner that constructions of any other statutory provision may be challenged. What must really be meant by the word "unfriendly", therefore, is simply a disagreement by the Comptroller and some national banks with some state policies protecting the unit banking or limited branching systems. But that, the Supervisors contend, is a matter which the Congress has left to the states to decide.

Petitioners also express frustration with the fact that the rulings on such matters as armored car messenger services, shopping center receptacles, teller machines and loan production offices are different in different states. Of course they are. Each reflects state statutes relating to branching which in and of themselves vary widely. Thus it is to be expected that restrictive rulings have emanated from such states as Florida relating to these activities because the Florida statute bars any off-premise activities with the single exception of permitting a bank to pick up deposits for school savings plans at the schools. FLA. STAT. 659.06. Indeed, all of the rulings restricting loan production offices or teller machines cited by the Comptroller (Brief, fn. 38, p. 39) and *amici* banks (pp. 5, 11-14) come from states which *prohibit* branching,[21] or restrict it,[22] with but one exception (North Caro-

[21] Illinois, Oklahoma, Texas and Florida. Note 5, *supra*.

[22] Kentucky, Georgia and Wisconsin (which only moved from a non-branching state in 1967 to permit a very limited branching in

lina—a statewide branching state) whose ruling the *amici* banks have misconstrued both as to federal and state law.[23]

The point is, as will now be demonstrated, that Petitioners' frustration with variant rulings relating to off-premise activities, is directed to the wrong forum. Congress *intended* this variation between states in the matter of branching in order to reflect differing local conditions and differing branching policies in each state. If the *amici* national banks are dissatisfied with branching policy in their states, they can seek amendatory state branch legislation, as national banks have sought to do in a number of states.[24]

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municipalities which have no banks or branch banks and where there are no banks or branch banks located within three miles of the proposed site of the branch). *Supra* note 6 and WISC. STAT., ch. 253 (1967).

[23] The ruling cited by the *amici* banks from the Attorney General of North Carolina to the Commissioner of Banks, Dec. 23, 1968, disapproving loan production offices is said to be in violation of the approval of such offices by the Federal Reserve Board "only four months prior to his ruling. 33 F.R. 11812 (Aug. 14, 1968)." (Brief, p. 5) This is incorrect. The Federal Reserve Board ruling simply removed any bar in *federal* statutes to such an office but, as the Chairman of the Federal Reserve Board testified the following month in explanation: "If the law of the state where the bank is chartered, as interpreted by State authorities, prohibits the bank from conducting its operations in this fashion, that will end the matter." *Hearings before the Committee on Banking and Currency, on Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 31 (1968). Secondly, the specific holding of the opinion of the North Carolina Attorney General was not as broad as *amici* banks would imply. It simply held that where an automobile dealer, pursuant to an arrangement with a bank, is authorized by a bank to complete a note and security instrument for a purchaser, and the purchaser is thereby authorized to draw a draft on the bank for the amount of the loan, *all in the automobile dealer's office*, that place constitutes a loan production office. That is *all* the opinion held and the extenuated hypothecations of the result of that opinion with regard to other off-premise activities drawn by the *amici* banks at great length in their brief are just that.

[24] See 32 U. CHI. L. REV. 148, (1964), with references to current news reports.

## ARGUMENT

### I. Congress Affirmatively Adopted A "Policy Of Equalization" In The National Bank Act When It Designated State Law As The Standard For Banking Operations Of National Banks In Many Basic Competitive Areas.

No one challenges the fact that Congress could have barred the applicability of state law to all operations of national banks. However, it did not do so. It adopted a "policy of equalization" whereby state law is applicable to national banks in many of the basic competitive areas of banking. The development of this "policy of equalization", which plays a critical decisional role in this case, requires a brief survey of the history of the banking system of the United States.[25] That history can be roughly divided into three periods:

The first period lasted until 1863 during which, except for the brief periods of the First (1791-1811) and Second (1816-1832) Banks of the United States holding charters from Congress, there was only a state banking system.

The second period lasted from 1863 to 1913. The birth of a system of national banks in 1863 chartered by the federal government and issuing notes secured only by their holdings of government bonds, was engendered by Secretary of the Treasury Salmon P. Chase in order to provide a market for government bonds, and hence funds required to finance the Civil War. The system was also designed to replace the highly diversified issues of state bank notes which would be encouraged out of existence by a heavy federal tax. Such was the import of the legislation of Congress in 1863,[26], 1864[27] (the National Bank

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[25] See, generally, BANKING STUDIES, *supra* note 2; BANKING & MONETARY STUDIES Carson ed. 1963; PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS (1961).

[26] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[27] Act of June 3, 1864, ch. 106, 13 Stat. 665.

Act) and 1865.[28]

State banks declined drastically after this legislation and the survival of the state banking system was largely the result of the growth and profitability of deposit banking.[29] With their recovery, however, the "dual banking system" first emerged as a reality—a system wherein state banks operated under state law, and national banks operated entirely under the National Bank Act, which then had but few references to state law.[30] It was *during this period* of almost complete duality that this Court decided a series of cases, upon which Petitioners rely so heavily in this case, to the effect that the National Bank Act constitutes ". . . by itself a complete system for the establishment and government of national banks . . . ." *E.g.*, *Cook County National Bank* v. *United States*, 107 U.S. 445, 448 (1883). Further, it was during this period (considering the part which national banks played in the currency scheme of the United States) that this Court considered national banks to be "federal instrumentalities", *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664 (1899), in the same manner as Chief Justice Marshall had considered the Second Bank of the United States to be a federal instrumentality in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

The third period commenced with the Federal Reserve Act of 1913,[31] and continued through the great banking legislation of the McFadden Act of 1927 and the Banking Act of 1933. The character of the banking system of the United States was *fundamentally* changed by this legisla-

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[28] Act of Mar. 3, 1865, ch. 78, 13 Stat. 484; see also Act of July 13, 1866, ch. 184, 14 Stat. 146; *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869).

[29] BANKING STUDIES, *supra* note 2, at 15, 418.

[30] See Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108 (rate of interest on loans) and Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111 (national bank shares taxable at rate not to exceed rate on state bank shares).

[31] Act of Dec. 23, 1913; ch. 6, 38 Stat. 251.

tion. First, the adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913, and the retirement of notes issued by the national banks in 1935, diminished to the point of extinction the role of national banks as "federal instrumentalities" in the fiscal operations of the government.[32] Second, there was a strong effort to strengthen the national banking system by broadening its statutory authority so that it could better compete with state banks.[33] Third, the federal gov-

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[32] A cogent marshalling of facts supporting this conclusion is to be found in the dissenting opinion in *First Agric. Nat'l Bank* v. *State Tax Comm'n.*, 392 U.S. 339 (1968), finding that national banks are no longer federal instrumentalities (an issue which the majority did not find necessary to reach to decide the case.) The Dissent noted that ". . . national banks under Civil War Legislation, to which national banks today trace their history, had important and significant functions concerning currency. . . . All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U.S.C. 221 et seq., and by subsequent developments with respect to both the Federal Reserve System and to national banks. To capsulize those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U.S.C. 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so." 392 U.S. 343, 356. The Dissent concluded: "Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors." *Id.* at 358.

[33] "The diminished importance of national banks as federal functionaries was compensated for by the enactment of legislation designed to make them more competitive with state banks, *e.g.*, branch banking, 44 Stat. 1228 (1927), as amended, 12 U.S.C. 36(c) fiduciary powers, 76 Stat. 668 (1962), 12 U.S.C. 92(a); rate of interest on loans, 48 Stat. 191 (1933), as amended, 12 U.S.C. 85; capitalization, 48 Stat. 185 (1933), 12 U.S.C. 51; and interest on time and savings deposits, 44 Stat. 1232 (1927), 12 U.S.C. 371." *First Agric. Nat'l Bank* v. *State Tax Comm'n.*, 393 U.S. 343, 356-357 (1968) (Dissent). See, also, H.R. REP. NO. 83, 69th Cong., 1st Sess. 6 (1926) commenting on the McFadden Act: "The enactment of this bill into law will put new life into the national banking system. The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of national banks will be more nearly on a par with those of the State member banks. . . . Many of these State banks are operating under modern banking codes."

ernment, for the first time, entered into the field of the regulation of state banks electing to become members in the Federal Reserve System established in 1913, or later undertaking deposit insurance from the Federal Deposit Insurance Corporation under the enactment of 1933.[34]

Fourthly, and of particular significance to this case, it was during this period between 1913 and 1933 that a "policy of equalization" was finally forged wherein Congress established state law as the standard for national banks in many of the important areas of banking. Thus, it was in 1918 that the Comptroller was authorized to permit national banks, when not in contravention of state or local law, to act as a trustee or in any other fiduciary capacity in which state banks which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located.[35] In 1927 national banks were not permitted to pay interest on time and savings deposits at rates in excess of those permitted by state law for state banks.[36] In 1930 a national bank was permitted to give security for state deposits which made them eligible for deposits which previously were only available to state banks.[37] In 1933

[34] Under the Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified in 31 U.S.C. 409 and in various sections of 12 U.S.C.), and under the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified in scattered sections 12, 15, 39 U.S.C.), the Federal Reserve Board was given a wide variety of supervisory powers over state member banks, and the Federal Deposit Insurance Corporation was given a similar supervisory authority over state non-member insured banks. Congressional authority over state member banks stems from the fact that they voluntarily accepted federal regulation as the "price" for the benefits of membership in the System. See *Westfall* v. *United States*, 274 U.S. 256, 258-9 (1927).

[35] Act of Sept. 26, 1918, ch. 177, 40 Stat. 968, *as amended*, 12 U.S.C. 92a(a) (Supp. 1969)

[36] Act of Feb. 25, 1927, ch. 191, 44 Stat. 1233

[37] Act of June 25, 1930, ch. 604, 46 Stat. 809, *as amended*, 12 U.S.C. 90 (Supp. 1969)

state law was made the measure of capitalization of new banks in certain instances.[38] And, of course, in 1927 and again in 1933 Congress made state law the standard for branches of national banks, as will be developed in detail at pages 22-25, *infra*.

In the case of *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934), this Court had occasion to consider the foregoing pattern of the National Bank Act, in connection with construing the 1930 amendment of the Act referenced above, and concluded that Congress had intended to adopt a "policy of equalization" therein. 292 U.S. 564-5. Similarly, in the *Walker Bank* case, *supra*, decided in 1966, this Court in declaring Congressional intent in Section 36(c) of the Act to place national and state banks on a basis of "competitive equality" under state law insofar as branch banking was concerned, concluded that it was part of the overall "policy of equalization" adopted by Congress in the National Bank Act. 385 U.S. at 261.[39]

In addition to specifically applying state law to national banks in many instances, Congress also effectuated the "policy of equalization" by refraining from occupying the field so as to preclude the application of state laws which do not conflict with federal law to national banks. Thus, in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640

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[38] Act of June 16, 1933, ch. 89, 48 Stat. 185, *as amended*, 12 U.S.C. 92a(i) (Supp. 1969)

[39] In the interim between *Lewis* v. *Fidelity & Trust* and *Walker Bank* there had been additional indications of the "policy of equalization". Thus in 1950 no conversion of a national bank to a state bank, or its merger with a state bank, was permitted "in contravention of the law of the State in which the National Banking Association is located." Act of Aug. 17, 1950, ch. 729, 64 Stat. 456, 12 U.S.C. 214c (1964). Also, in the Bank Holding Company Act of 1956, there was a reservation of power to the states over bank holding companies, and bank subsidiaries, Act of May 9, 1956, ch. 511, 70 Stat. 133, 12 U.S.C. 1846 (1964). This latter provision negates the suggestion of the *amici* banks (Brief, p. 16) that the decision of the court below would somehow give states more power than they presently have with regard to bank holding companies.

(1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co., supra*, this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6. See, also, *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938), *McClellan* v. *Chipman*, 164 U.S. 347 (1896), all of which, along with *Lewis* v. *Fidelity & Deposit Co., supra*, were cited by this Court in the *Walker Bank* case in support of its statement that a "policy of equalization" underlies the National Bank Act. 385 U.S. 261.

Congress has thus given a special significance to the applicability of state law to the national banks which it has created. It has *intended* that state law be applicable to national banks in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive. As Representative McFadden, the sponsor of the McFadden Act of 1927 said:

> "The business of banking is a competitive commercial enterprise like any other business which makes a profit through the rendition of service to the public. Under our financial system where in each State of the Union there are two systems of banking—National and State—each in natural competition with the other for business, it is necessary for their mutual existence that their charter powers be substantially equal." . . . 65 CONG. REC. 11296 (1924)

Thus "the goal of equality" in the more important areas of banking based upon *state* law applicable to *both* state and national banks, which the court below sought to serve is not, as [redacted] the Comptroller urges, "chimerical". (Brief, p. 10) It is a *fact* of Congressional *intent*.

**II. Nowhere Has The "Policy Of Equalization" Been More Forcefully Demonstrated Than In The Competitive Equality Established In The Branching Provisions Of The National Bank Act.**

As noted below (A. 397-399), this Court had occasion in the *Walker Bank* case to consider exhaustively the legislative history of Section 36(c)(1) of the National Bank Act, first enacted in the McFadden Act of 1927, and Section 36(c)(2) of the Act, first enacted in the Banking Act of 1933. The conclusion drawn, stated at 385 U.S. 261, was that:

> ". . . Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned."

It was primarily on the basis of this holding of Congressional intent that the court below correctly concluded that Congress did not intend the delineation of a "branch" to be solely a matter of federal law, thus permitting the Comptroller to determine unilaterally that an off-premise office of a bank is not a "branch" and, therefore, immune from any restriction in state branching law under Section 36(c).

The Comptroller recognizes the foregoing as the central issue of this case. However, he denigrates "competitive equality" as a "catchy" phrase or "slogan" (Brief, p. 15), meaning nothing more than an effort of Congress in the McFadden Act of 1927 to bring national banks up to the level of branching authority held by state banks (Brief, pp. 15-23). He rejects a reading of the legislative history as reflecting a determined Congressional intent to equalize the branching powers of state and national banks on the basis of state law.

The Comptroller errs. Whereas he is correct that the principal motivation for the branching provisions of the McFadden Act of 1927 was to repair a competitive disadvantage held by national banks unable to compete with

state banks holding branching authority under state law, this is by no means the whole story. The legislative history of Section 36(c), both in the McFadden Act of 1927 and the Banking Act of 1933, makes it equally clear that Congress intended to establish state law as the standard for branching of *both* national banks and state banks and, thereby, to establish competitive equality between the two *based on state law.* This fact can be demonstrated by reference to just two essential portions of that legislative history—the rejection of the Hull amendments in the 1927 bill and the rejection of the Glass proposal in the 1933 bill.

As this Court said in the *Walker Bank* case in its discussion of the history of the McFadden Act of 1927:

> "The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching." 385 U.S. 258.

This was a reference to the so-called "Hull amendments" to the House bill (H. R. 2) which had proposed that national banks and state member banks might only establish intra-city branches in states permitting such branches at the time of the enactment of the bill.[40] No right was given to such banks if, at a later time, state law permitted state banks to establish such branches. The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on state legislatures to decline to expand branch authority and that the matter of branching privileges was a matter for the states to decide. It said:

> "The real purpose of the Hull amendments, as shown by the testimony given before your commit-

[40] H. R. REP. No. 83, 69th Cong., 1st Sess. 4-5 (1926).

> tee, is to bring pressure to bear upon the leading bankers in States which now prohibit branch banking by depriving them of the motive to seek a change in the State laws favorable to branch banking. It is to coerce them to remain silent. Your committee feels that this is an unprecedented policy for the Federal Goernment to pursue and constitutes an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." [41]

Congressional intent to establish state law as the standard for competitive equality between state and national banks in the matter of branching is also illustrated by the rejection of the Glass proposal in the Banking Act of 1933. As noted by this Court in the *Walker Bank* case, 385 U.S. 259, the initial legislation submitted by Senator Carter Glass, ultimately the sponsor of the Banking Act of 1933, proposed that national banks should be able to organize branches *irrespective of state law*, knowing full well, as the Senator said, that:

> ". . . if Congress enacts this bill into law, there is not a state in the Union that will not promptly authorize its State banks to get on an equality of competition with the national banks by adopting the state-wide branch banking system." 75 CONG. REC. 9892 (1932).

As this Court noted, this proposal ". . . was strenuously opposed and was eventually defeated." 385 U.S. 259. The bill was finally passed after an amendment was adopted on the floor of the House (known as the Bratton amendment and itself amended by amendments of Senators Wheeler, Copeland and Blaine),[42] which restored state law as the standard for branches of national banks. In this connection Senator Bratton said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking

[41] S. REP. No. 473, 69th Cong., 1st Sess. 9 (1926).

[42] 76 CONG. REC. 1997, 2080, 2079, 2205 (1933).

> shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 CONG. REC. 1449 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said:

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." 76 CONG. REC. 1997 (1933).

The Bratton amendment, as amended, passed the Senate on January 21, 1933, 76 CONG. REC. 2208. The bill was not enacted, however, until the following session at which time the language of the branch provision had been modified somewhat by the Conference Committee. H.R. REP. No. 254, 73d Cong., 1st Sess. 29 (1933).

Thus, if there is one clear-cut, unequivocal, point to emerge from the legislative history of Section 36(c) of the Act, it is, as this Court found in *Walker Bank*, a Congressional intent to place national and state banks on a basis of "competitive equality" insofar as branch banking is concerned. That competitive equality was not, as the Comptroller urges, simply a desire to give national banks the right to branch held by state banks. It was the establishment of a standard of branching for *both* classes of banks *based upon state law.*

**III. Petitioners' Efforts To Immunize The Comptroller From State Law In The Determination Of A "Branch" Is Destructive Of Congressional Intent In Section 36 Of The National Bank Act To Establish Competitive Equality In The Matter Of Branching Based On State Law, And Is Not Supported Either By The Language Or The Legislative History Of Section 36(f) Of The Act, Or By Any Alleged Necessity To Protect The National Banking System.**

In the light of the policy emerging from the legislative history of the branching provisions of the 1927 and 1933 legislation set forth above, the Supervisors submit that the principal tool of statutory construction applicable in this case must be the implementation of the broad national policy of this legislation. *National Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612 (1967); *Lawson* v. *Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); SUTHERLAND, STATUTORY CONSTRUCTION, ¶ 4501 at 315 (1943): (". . . the application of the law according to the spirit of the legislative body remains the principal objective of judicial interpretation.") The construction sought by Petitioners which permits the Comptroller to define off-premise offices as non-branches immunized from state law would completely contradict "competitive equality" based on deference to state branch law which Congress intended in the branching provisions of the National Bank Act. *Walker Bank, supra.* Thus a national bank can not be authorized to conduct an off-premise activity held to be an unlawful branch under state law, even though the Comptroller may conclude that it does not fall into one of the activities delineated in Section 36(f).[43]

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[43] The principle of "competitive equality" for which the Supervisors contend, prohibiting a national bank off-premise activity declared not to be a branch under Section 36(f), but declared to be an unlawful branch under state law, would, in reverse circumstances, permit a national bank off-premise activity declared to be a branch under Section 36(f), but not to be a branch under state law. The requirement that a national bank may only be permitted a branch "expressly authorized" to a state bank was not included in the

Petitioners err in their reliance upon Section 36(f) in arguing that the Comptroller is completely immunized from state law in determining when an off-premise activity is a branch for the purposes of Section 36(c).

Section 36(f), on its face, is not an *all-inclusive* definition of a "branch". It does not say that "a 'branch' *means* . . . ." It says "the term 'branch' . . . shall be held to *include* . . . ." (Emphasis supplied)[44] In *Halver-*

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McFadden Act of 1927 (Comptroller's Brief, p. 51), but was added by the Banking Act of 1933 in Conference Committee, along with the "affirmatively and not merely by implication or recognition" language now in Section 36(c)(2). H.R. REP. No. 254, 73d Cong., 1st Sess. 29 (1933). The origin of that language was Senator Wheeler who wanted the words "expressly authorized" included to tie down the prohibition of branch banking in a state, such as Montana, which then had no branch statute. 76 CONG. REC. 1997 (1933). The Supervisors believe that it is consistent with this legislative history demonstrating a Congressional intent to avoid any situation by which a national bank could secure branches contrary to state law, to conclude that a construction of state law to permit an off-premise facility as a non-branch controls, so as to permit *any* state member or national bank to operate such an office even though it might be held to be a "branch" under the definition of Section 36(f).

[44] Section 36(f) of the National Bank Act and § 7-3-6 of the Utah Code (cited by the Petitioners) is to be contrasted with the all inclusive branch definitions which appear in varying state statutes. A sampling of these statutes follows: GA. CODE ANN. § *13-201.1(b)*. "The term 'branch bank' as used in this title *means* any additional place of business of any parent bank not located in the particular city, town, or village where its parent bank was chartered. *N. H. Rev. Stat. Ann. 384-B:1, III.* "Branch office *means* any house, office, separate building depot, agency, mobile facility or place of business, other than its principal office, at which deposits are received, checks paid, or loans made or payments thereon received, or any of a bank's other usual banking business is conducted, but shall not include any place at which records are made, posted, or kept." OHIO REV. CODE ANN. § *1101.01(D)*. "Branch *means* any office or other place at which a bank receives money or its equivalent from the public for deposit and conducts a general banking business, but does not include a bank's principle place of business." WASH. REV. CODE § *30.04.010*. " *'Branch bank'* means any office or deposit or discount maintained by any bank or trust company, domestic or otherwise, other than its principal place of business, regardless of whether it be in the same city or locality."

*ing* v. *Morgan's Inc.*, 293 U.S. 121 (1934), this Court indicated that "means" and "includes" can have a different meaning, and that "the natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Id.* at 125, n. 1.[45]

Thus to the extent that an off-premise activity of a bank is found to be included in the delineated activities in Section 36(f), it is a "branch". But since the provision is not all-inclusive, there is clearly room for other off-premise activities of a bank as "branches". And the determination of whether *other* off-premise acitivites of a bank are "branches", prohibited to national banks because they are prohibited to state banks under state law, is to be determined by state branching policy as reflected in state statutes relating to branching. Otherwise, the competitive equality intended in the matter of branching underlying Section 36(c) is subverted. The court below correctly so held:

> "Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term 'branch' 'shall be held to include' these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the lifeblood of banking. If we construed Section 36(f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths." (A. 406-407)

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[45] See, also, *Fed. Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95, 99-100 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941).

The legislative history of Section 36(f) supports this conclusion. It demonstrates a Congressional intent to make sure that included in the term "branch" would be one type of off-premise activity—tellers' windows—which the Comptroller of that era had permitted and which was generally thought to be an unlawful branch activity. The chronology runs as follows:

In 1923 the Attorney General of the United States advised the Comptroller that he could authorize national banks to establish a separate office where only "routine services" were performed, such as the receipt of deposits and cashing checks, on the grounds that such an office was not a "branch". The ruling was made applicable to intra-city additional offices but not to such offices outside of the city designated in the national bank's organizational certificates. (34 OP. ATT'Y GEN. 1) This ruling, sought by Comptroller Dawes, thus validated so-called tellers' windows for national banks which had been authorized by his predecessor, Comptroller Crissinger, the preceding year.

On January 28, 1924, this Court issued its decision in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), holding that a national bank had no power to establish a branch in contravention of state law. Then, as was later explained during the debates on the McFadden bill:

> "Subsequent to this decision the United States Government requested a rehearing on the point that this decision left uncertain the legality of the establishment of 'additional offices' in the cities in which the parent bank is located, which was authorized by Comptroller Crissinger in 1922. The Supreme Court, however, refused the requested rehearing; but, nevertheless, the comptroller has continued to sanction the establishment of 'additional offices' in the home city

> of a parent national bank in States where State banks are allowed to maintain branches." [46]

On February 11, 1924, Mr. McFadden introduced H.R. 6855 (68th Cong., 1st Sess.), which contained a provision that a branch "shall be held to embrace any additional office maintained by an association at which deposits are secured or checks cashed outside of the parent bank." On April 15, 1924, during the hearings on this bill, a confidential reprint of that bill was introduced [47] which contained language which, with slight modifications, became the provision eventually enacted as Section 36(f).[48]

On June 7, 1924, Mr. McFadden stated during the debates:

> "Under a ruling issued by ex-Comptroller of the Currency Crissenger, and supported by an opinion from the then Attorney General, national banks in cities where State banks were engaged in branch banking were permitted to establish what has been called 'additional offices' or 'tellers' windows' for the receipt of deposits and cashing checks. . . . A limited number of these additional offices have been established, but their status is not legally certain in view of the implications in the decision of the Supreme Court in the St. Louis case, and they are otherwise not adequate to meet the situation. . . . This bill will clear up the uncertainties which may be

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[46] Report of Mr. Witte (Chief, Wisconsin Legislative Reference Library, attached as an appendix to a speech of Mr. Nelson of Wisconsin. 66 CONG. REC. 1578 (1925) See, also, FISCHER, *supra* note 2 at 44-47.

[47] *Hearings on H. R. 6855 before the House Committee on Banking and Currency*, 68th Cong., 1st Sess. 53 (1924).

[48] The provision included the words "or branches" and did not include the phrase "located in any State or Territory of the United States or in the District of Columbia". *Id.* at 3. The latter phrase was included in the provision contained in H. R. 8887, introduced April 25, 1924. No explanation was given for the change in language from H. R. 6855.

involved in this situation." 65 CONG. REC. 11298 (1924)

The same point was made in later debates. Thus Mr. Stevenson, a member of the House Committee on Banking and Currency, after discussing the Comptroller's ruling and the *Missouri* case, cited the provision (now Section 36(f), and said: ". . . you take away from the comptroller the right to say that banks can maintain offices at which they can pay checks and receive deposits." 66 CONG. REC. 1628 (1925).

Substantially all references to Section 36(f) in the debates which took place in 1925 and 1926 are in relation to the *Missouri* decision and tellers' windows. 66 CONG. REC. 1627-28, 4410, 4432-33 (1925); 67 CONG. REC. 1777, 2840-41, 2860, 3232, 3238, 8396 (1926).

Thus, Petitioners err in jumping from a statutory provision which states that a branch "*includes*" (emphasis supplied) the type of activity performed by a tellers' window, representing the most immediate threat to the integrity of branching provisions Congress was considering in the McFadden Act, to the ultimate conclusion that Section 36(f) was intended by Congress as an *all-inclusive* definition of a branch, completely immunized from any reference to state law. There is simply nothing in the words of Section 36(f) or in the legislative history of Section 36(f) to suggest such a conclusion.

The foregoing recitation of legislative history also answers Petitioners' reliance upon a 1911 opinion of the Attorney General, 29 OP. ATT'Y GEN. 81 (1911). They argue that this opinion, approved by this Court in 1924 in the *Missouri* case, *supra*, at 658, fn. 1, meant that anything less than an off-premise office conducting a full banking business was not a forbidden "branch", and that Congress intended to carry that concept over into the McFadden Act of 1927. The Petitioners err. A "teller's window" is a limited power branch *not* conducting a full

banking business, and the legislative history of the McFadden Act makes it eminently clear that Congress intended that the issue of whether such a facility could be conducted by a national bank was to be decided by reference to *state* statutes relating to branching.

The Comptroller also points to off-premise messenger services performed by national banks with armored cars before the McFadden Act, citing certain articles in the *Bankers' Magazine* for the period 1906 through 1912. But whatever may have been the validity of the referenced armored car messenger services in 1912, even the Comptroller would now agree that they would be unlawful. These services clearly fall under the ruling of the Deputy Comptroller of the Currency in 1962 ". . . that the practice of furnishing mobile pick-up service of the deposits of customers is a type of branch banking which the statutes do not permit." (A. 359)

A final comment should be made with regard to the argument of the Comptroller and the *amici* banks that failure to immunize branch definition from state law would seriously jeopardize the existence of the national banking system. The theory advanced is that "imaginative and vigorous national banks" (Comptroller's Brief, pp. 33-34) are developing modern concepts of banking which, under the ruling of the court below, "would subject national banks to unfriendly state legislation" (*Id.* at 36) construed by "state banking departments . . . controlled by persons from or associated with state banks" (*Id.* at 38), and would result in an "extraordinary disparity of treatment of national banks by the various states" (*Amici* Brief, p. 5).

This line of argument errs on all counts.

First, there is "extraordinary disparity of treatment of national banks by the various states" in the matter of branching today. This result was *specifically* intended by Congress when it rejected the proposal of Senator Glass

back in 1933 to permit the establishment of branches of national banks regardless of state law and to make state branch law the standard for branches of national banks. pp. 24-25, *supra.*

Second, with regard to the Comptroller's hypothecation of "unfriendly" state legislation, the idea that a state would pass branching legislation designed to hurt national banks when that legislation would be equally applicable to state banks, is simply preposterous. When the Comptroller refers to the possibility of "unfriendly" legislation he must simply mean legislation with which he might disagree. But Congress established *state* branch law as the standard for branches of national banks in 1927 and 1933, as part of the final forging in the 1913-1933 period of a "policy of equalization" involving the establishment of state law as the standard for national banks in *many* areas. (pp. 16-21, supra.) It is, therefore, no help for the Comptroller to quote the reference by this Court to "the hazard of unfriendly legislation by the States" in *Tiffany* v. *National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (Brief, p. 35). *Tiffany* was decided in *1874*, shortly after Congress had passed a bank note tax designed to put state banks out of business! The Court there noted that "national banks have been national favorites"; "much has been done to insure their taking the place of state banks"; and state banks "have been substantially taxed out of business." 85 U.S. 409, p. 413. Surely too much water has flowed under the dam in the past 95 years, including the final development of the "policy of equalization" in the 1913-1933 era wherein Congress subjected national banks to state legislation in many areas, for *Tiffany* to affect the current situation.

Third, the concept that the decision below somehow places national banks at the mercy of the Supervisors is totally unwarranted. As noted at p. 12, *supra*, the source of state law is not Supervisor imagination, but the *statutes* of a state reflecting its branching policy. The only

guide to the construction of the Florida branch statutes involved in this case which the court below had before it was a ruling by the state supervisor. The court adopted that ruling after agreeing that it appeared in accord with the Florida statute limiting banking activities to one place of business. (A. 408-409) Recognizing that a more authoritative construction would emerge from pending litigation in a state court, however, it directed that the district court retain jurisdiction and "if Florida law is ultimately determined to be different than here expounded", the court was then to review the decision. (A. 409)

Fourth, the argument of the Comptroller that somehow the result of the decision below is tantamount to Supervisor approval of the Comptroller's decisions regarding branch banking is without merit. (Brief, pp. 39-41) Of course the Comptroller does not have to seek Supervisor approval of his decisions. But since *Congress* has provided that the establishment of branches of national banks is to be determined by *state* law, surely Congress did not intend an iron curtain to descend between the Comptroller's office and the Supervisors. In the words of the Sixth Circuit, "all of the foregoing would seem to demonstrate the wisdom of cooperation between the state and federal banking authorities in matters affecting the approval, and the establishment of state and national banks", and "such cooperation appears to have been intended by Congress . . . ." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 543 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 (1958). *Consultation* as to the meaning of state law is *not* tantamount to Supervisor approval of decisions of the Comptroller.

Finally, Petitioners have compiled a fearsome list of activities which, they assert, state supervisors can strike down under the decision of the court below under the guise that they are "branches" forbidden under state law. The list compiled by the Comptroller, for example, includes such matters as new-business solicitation, sale of

money orders and travellers checks, banking by mail, credit card services, various correspondent services, etc. (p. 34) The listing of the *amici* banks is even longer. (pp. 6-7)[49]

The facts are that substantially the only type of rulings relating to off-premise activities of a bank cited by the Petitioners have involved armored car messenger services, shopping center receptacles, deposit machines and loan production offices. (p. 12, *supra*) States which held these activities to be unlawful branching have found that the production of loans and the picking up of checks and the making of deposits away from the banking house comprise banking business contrary to the unit banking concept embedded in their statutes prohibiting branch banking. Indeed, these states can legitimately ask the question "who needs a branch?" if loans can be produced at loan production offices and check cashing and deposits can be handled through various mobile and mechanized means. Thus, what may be "imaginative and modern expansion" to some may spell a breakdown in unit banking and resulting economic concentration to others. There are arguments on both sides of this issue. Congress has selected *state* legislatures as the forum in which that issue is to be resolved. In Florida a bank may not avoid the prohibition against branch banking by purporting to act as the "agent" of its customers for the purpose of engaging in banking transactions with itself.

To go further and suggest, as the Petitioners do, that unless the definition of branching is completely immunized from state law, state legislatures or Supervisors may embark on a program to prohibit their *own* banks from such activities as banking by mail or credit cards (a universal practice throughout the country of both state

[49] Some of these hypothecations are irrelevant to the discussion. The issue here is the off-premise activity of a *bank*, which would clearly not cover services by an independent contractor such as Brinks. (Brief, p. 6)

and national banks) in order to somehow hurt national banks, is a thoroughly unreasonable hypothecation. Further, state branch statutes are not, in and of themselves, open-ended. Unreasonable construction of those statutes can be struck down in the same manner as constructions of any other statutory provision may be challenged.

Thus the dire predictions advanced by the Petitioners resulting from an affirmation of the judgment of the court below are not real. Contrawise, the predictions advanced by the Supervisors resulting from a reversal are real. The dual banking system simply could not survive a situation wherein national banks were permitted substantial off-premise activities not permitted to state banks under state law. State legislatures would be forced to amend their statutes each time the Comptroller rules that new off-premise activities are non-branches under Section 36(f), and the standard of state law established by Congress to achieve competitive equality between national and state banks in the matter of branching would be substantially eroded. Implementation of Congressional intent can only be achieved by holding, as the Supervisors urge, that the determination of a "branch", for the purposes of Section 36(c) of the National Bank Act, is not exclusively a matter of federal law under Section 36(f) of that Act, but includes off-premise activities of national banks declared to be an unlawful branch for state banks under state branch statutes.[50]

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[50] The recent ruling of the Federal Reserve Board, 33 F.R. 11812 (Aug. 14, 1968), is in accord with the position taken by the Supervisors. There, as explained by Chairman Martin, the Board ruled that a loan production is not a "branch" under Section 36(f), but that the operations of such an office may be prohibited by states holding such an office to be an unlawful branch under state law. See *Hearings before the House Committee on Banking and Currency, on Federal Reserve Board Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 31 (1968).

## CONCLUSION

For the reasons set forth above, the National Association of Supervisors of State Banks seeks affirmation of the judgment of the court below, and an affirmative answer to the question presented to this Court by this case, as set forth at page 1, *supra*.

Respectfully submitted,

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